Supreme Court, U.S.
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No. 91-845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

JAMES M. LAROSSA
LAROSSA, MITCHELL & ROSS
Attorneys for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 696-9700

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REPLY BRIEF

ARGUMENT

I

THE GOVERNMENT CONCEDES THAT THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW ON DEPARTURE

The government candidly concedes that the court of appeals erred in ruling that it could not review the district court's finding that it lacked the authority to grant petitioner a downward departure from the Sentencing Guidelines. Brief in Opp. at 8 n.4. Nevertheless, the government urges this Court to deny the petition on the grounds that "the district court was correct [in denying departure], and the opinion of the court of appeals is unpublished and therefore without precedential value." Id. (citation omitted). Neither of these reasons, however, warrant that this Court should disregard the conceded error of the court of appeals.

First, petitioner's main brief establishes that the district court did in fact have the authority to depart downward from the sentencing guidelines in this case. See Pet. at 27-35. While the government claims that cases involving not-for-profit conspiracies to distribute drugs were considered -- and found to be irrelevant -- by the Sentencing Commission in formulating the guidelines for narcotics offenses, Brief in Opp. at 9, it fails to cite a single case in which the government has successfully prosecuted such a conspiracy. Thus, the government's argument is completely at odds with the Guidelines themselves, which indicate that they were designed to incorporate only those factors which made a "significant difference in pre-guidelines sentencing practice." U.S.S.G. Ch.1, Pt. A, intro. comment. 4(b).

Secondly, the fact that the Eighth Circuit's opinion is unpublished does not in any way alter the fact that the court of appeals failed to follow its own precedent as well as that of the other circuits. See cases cited in Pet. at 36-37. Moreover, should this Court deny the instant petition for certiorari, petitioner will have been denied any appellate review of his claim, notwithstanding that the government concedes it is fully reviewable.

II

THE DISTRICT COURT DID NOT MAKE THE REQUIRED FINDINGS REGARDING THE QUANTITY OF DRUGS ATTRIBUTABLE TO PETITIONER FOR PURPOSES OF SENTENCING

A. The Johnson Purchases

The government asserts that "[i]n its final quantity determinations, the court reviewed the Presentence Report's assessments paragraph by paragraph and made specific findings regarding the amount of cocaine chargeable to petitioner." Brief in Opp. at 5 (emphasis added). The government's statement, however, is terribly misleading. The district court merely prepared a chart indicating the number of grams that should be attributed to each defendant in relation to the various paragraphs of the pre-sentence report. There was absolutely no record made, nor any explanation given,

as to the basis for any of the amounts on the court's chart.

Accordingly, when the government claims that the court's estimate of 250 grams in relation to the Johnson purchases represents "slightly in excess of one quarter ounce per sale multiplied by thirty sales," Brief in Opp. at 12, it is merely speculating as to how the court arrived at its assessment. Moreover, it seems very unlikely that the court would make an "estimate" using 8.333 grams (250 grams divided by thirty) as the base amount for each purchase.

It is not disputed that a sentencing court may approximate the amount of drugs attributable to a defendant in a case where no drugs are seized. See U.S.S.G. § 2D1.4, comment. (n.2). But, if an approximation is made, as it was here, there must be an evidentiary basis in the

record to support the amount chosen. See Pet. at 46. Because there was absolutely no evidence in the record to support the amount assessed here, however, coupled with the fact that the court failed to put on the record how it arrived at its figure, certiorari should be granted.

B. The McVay Quantities

The government urges this Court to infer that the district court found the McVay quantities to be "in furtherance of the conspiracy" from the court's reference to U.S.S.G. § 2D1.4 and the court's statement that it was assessing these amounts under the "co-conspirator rule." Brief in Opp. at 11. While the court did mention the "co-conspirator rule," however, it never applied the second prong of the rule in this case. In other words, although the court found that the McVay quantities were foreseeable to petitioner,

it never made any specific finding -- despite the government's assertion to the contrary -- that these quantities were in furtherance of the alleged conspiracy. See Pet. at 39.

III

THE GOVERNMENT HAS NOT PROVEN A CONSPIRACY TO DISTRIBUTE NARCOTICS

Despite the government's mischaracterization of his argument, petitioner has never asserted that there must be a "sale" of narcotics in order for there to be a "distribution."[1] See Brief in Opp. at 7. Rather, petitioner's claim is that the not-for-profit sharing of cocaine among drug users and suppliers in social settings is not, in and of itself, sufficient to establish an agreement to distribute drugs.

Furthermore, the government takes the astonishing position that the Eighth Circuit's opinion does not conflict with the Eleventh Circuit's decision in United

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[1]Accordingly, the cases cited by the government on this issue -- all of which merely support the proposition that there need not be a "sale" to establish a "distribution" -- are inapposite.

States v. Hardy, 895 F.2d 1331 (11th Cir. 1990). In a desperate attempt to distinguish Hardy, the government states that "the only evidence supporting the charge that Hardy conspired to distribute cocaine was that he once purchased one-eighth of an ounce of cocaine to use with a friend and on another occasion gave a small amount of cocaine to a house guest." Brief in Opp. at 7 (emphasis added). As evidenced by the government's own brief on appeal in Hardy, however, "the evidence showed that [Hardy] provided a secure place where cocaine could be delivered, that often times the suppliers were also guests of [Hardy], that cocaine was knowingly distributed and shared on the premises by [Hardy] and his invitees, and that the incidents constituted 'regularized activity' recurring over a

substantial period of time." Pet. App. at 11a.

Finally, the government attempts to inject a "commercial" element into this case by repeatedly claiming that petitioner financed Johnson's initial purchase of cocaine in Florida. See Brief in Opp. 3 n.3, 8. At the very least, this is a misleading half-truth. Although Johnson did testify that at one time petitioner loaned him $3,000 and that he bought cocaine with the money, (R. 1289), he never asserted -- and there was not a scintilla of evidence adduced at trial -- that petitioner knew the purpose for the loan.[2] The government's assertion,

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[2]In fact, the only witness to testify as to whether petitioner knew the purpose of the loan was petitioner himself, who testified that the money was a personal loan and was not for the purpose of enabling Johnson to purchase drugs. (R. 3746).

therefore, lacks any support in the record.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

JAMES M. LaROSSA
LaROSSA, MITCHELL & ROSS
Attorneys for Petitioner
Thomas Dean Vogt
41 Madison Avenue
New York, New York 10010
(212) 696-9700

Of Counsel

Karen F. Silverman
Andrew J. Weinstein